Supreme Court, U. S.
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No. 80-370

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK FARKAS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the dismissal of his damage action against the United States and several Internal Revenue Service employees on the ground of sovereign immunity and because he failed to serve the complaint upon the individual named defendants.

The pertinent facts may be summarized as follows: On August 23, 1976, petitioner pleaded guilty to one count of willful evasion of his federal income taxes (Pet. App. 5a; A. A11-A12).[1] On April 11, 1979, petitioner filed this suit for damages in the United States District Court for the District of Columbia, naming as defendants the United States, the then-current Commissioner of Internal

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[1] "A." refers to the pages of the appendix filed by petitioner as an attachment to his brief in the court of appeals.

Revenue, and two Internal Revenue Service agents (Pet. App. 3a-5a). In his complaint, petitioner alleged that the defendants conspired to deny his civil rights. Specifically, petitioner charged that during the course of a tax audit, respondent IRS Agent Howell Elliott took possession of certain of his tax records, and that the IRS later refused to return the records to him for use in his defense against the tax evasion charges. Petitioner claims that the lack of the records resulted in his guilty plea (Pet. App. 4a-5a).

Pursuant to Fed. R. Civ. P. 12(b), respondents moved to dismiss the complaint on the grounds, *inter alia*, that the action was barred as against the United States by sovereign immunity, and that the individual defendants had not been properly served with process (A. A9-A25). The district court dismissed the suit with prejudice (Pet. App. 6a-7a). The court of appeals ordered that the suit be dismissed without prejudice. After noting that the government had not waived its sovereign immunity and that no personal service of the complaint had been made on the individual defendants, the court of appeals vacated the judgment of the district court dismissing the suit with prejudice but simultaneously entered its own order dismissing the suit without prejudice (Pet. App. 8a-9a).

1. The court of appeals correctly dismissed without prejudice petitioner's suit for damages. Petitioner challenges (Pet. 2-5) the dismissal of his suit against the United States on the ground of sovereign immunity. But it is well established that the United States may not be sued without its consent, for absent such consent no court has subject matter jurisdiction over such a suit. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141-142 (1972); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940). By

statute, the United States has waived its immunity and consented to be sued for certain specific classes of claims. See *United States* v. *Shaw*, *supra*, 309 U.S. at 500-501. Such a waiver, however, cannot be implied, but must be unequivocally expressed. *United States* v. *King*, 395 U.S. 1, 4 (1969). Petitioner failed even to allege the existence of such a waiver applicable to this action. The court of appeals therefore properly dismissed his suit.

Given the long and consistent history of the doctrine of sovereign immunity, petitioner cannot argue that the doctrine violates his right to due process. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Bell* v. *Hood*, 327 U.S. 678 (1946); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); and *Butz* v. *Economou*, 438 U.S. 478 (1978), upon which petitioner relies (Pet. 3-5), are distinguishable actions against individual officials for "bad faith" wrongdoing. They do not stand for the proposition that damage actions may be taken against the United States itself for such acts.

2. The court of appeals likewise correctly dismissed petitioner's suit against the individual respondents because he failed to serve his complaint on them. Rules 4(d)(1) and (d)(5) Fed. R. Civ. P. require that defendants in this type of action be served personally, whether or not they are being sued in their individual or official capacities. The district court was therefore without jurisdiction over the individual defendants. *Griffith* v. *Nixon*, 518 F. 2d 1195, 1196 (2d Cir.) cert. denied, 423 U.S. 995 (1975); *Rabiolo* v. *Weinstein*, 357 F. 2d 167, 168 (7th Cir. 1966), cert. denied, 391 U.S. 923 (1968); *Wallach* v. *Cannon*, 357 F. 2d 557, 558-559 (8th Cir. 1966). Since it is undisputed that petitioner failed to serve the individual defendants, dismissal of the complaint was proper whether or not they had actual notice of the suit. *Tart* v. *Hudgins*, 58 F.R.D. 116, 117 (M.D. N.C. 1972).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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